Petition

81-701

NO.

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In the
Supreme Court of the United States

OCTOBER TERM, 1981

PAUL J. GASPARD,

Respondent

versus

TAYLOR DIVING & SALVAGE COMPANY, INC., BROWN & ROOT, INC., and HIGHLANDS INSURANCE COMPANY,

Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the opinion of the Fifth Circuit Court of Appeal, No. 78-1299, July 2, 1981, is in conflict with prior law of this circuit, the Second Circuit and the United States Supreme Court by allowing an award to stand of $296,240.00 in damages for failure to pay maintenance and cure; and whether the standard to be applied in an action for failure to pay maintenance and cure is a showing of mere unreasonableness; whether the Court can hold that the award for $296,240.00 for failure to pay maintenance and cure is really an award for failure to provide cure and whether in doing so, the defendant's right to a jury trial and a fair trial under the Seventh Amendment is violated.

II. Whether recompression is "cure" and whether a failure to provide such recompression aggravated the necrosis condition.

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IN THE

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NO.

PAUL J. GASPARD,

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versus

TAYLOR DIVING & SALVAGE COMPANY, INC., BROWN & ROOT, INC., and HIGHLANDS INSURANCE COMPANY,

Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Taylor Diving & Salvage Company and Highlands Insurance Company, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on July 2, 1981.

OPINIONS BELOW

The United States District Court for the Eastern District of Louisiana rendered a Judgment which was signed on April 21, 1977. A copy of the judgment is contained in Appendix A of this Petition. Following entry of judgment, plaintiff appealed to the Fifth Circuit Court of Appeal which reversed and rendered in its reported opinion of July 2, 1981, at 649 F.2d 372 (Appendix B). The Denial of the Petition for Rehearing filed by defendants is contained in Appendix C.

JURISDICTION

Jurisdiction of this Honorable Court is invoked under 46 U.S.C.A. 688, et seq; the admiralty and maritime jurisdiction of the United States.

Judgment of the Fifth Circuit Court of Appeals was rendered on July 2, 1981. Defendants timely applied for rehearing which was denied by The Court of Appeal on August 24, 1981. On application of defendants, the Fifth Circuit Court of Appeal on October 5, 1981, issued a stay of mandate to enable petitioners to apply for and obtain a writ of certiorari from The Supreme Court of the United States, said stay issued up to and including October 9, 1981. This Petition for Writ of Certiorari is timely under 28 U.S.C. 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Amendment VII - Constitution of the United States.

In suits at common law, where the value in controversy exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States than according to the rules of the common law.

2. 46 U.S.C.A. 688

Recovery for injury to or death of seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in case of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right

of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Paul Gaspard was employed as a diver for Taylor Diving and Salvage Company from the middle of 1969 until May of 1974. In 1973 he was diagnosed to have osteonecrosis in his shoulder joint and he was taken off the diving rolls and made a diving supervisor, and in 1974 he left the employ of Taylor Diving and filed suit against that company, joining counts for negligence under the Jones Act, 46 U.S.C., §688, unseaworthiness and maintenance and cure. He contended that his condition was caused by his being forced to make "repetitive" or "Z" dives, utilizing improper or inadequate diving decompression tables which resulted in insufficient time for "stops" on his way to the surface from various dives. There was no single "accident" or "accidents". A jury found Taylor negligent and awarded Gaspard $45,000.00 under the Jones Act, $8,760.00 in maintenance and cure and $296,240.00 for failure to pay maintenance and cure. Taylor filed motions for new trial and for judgment N.O.V. The Court denied the motion for new trial, but granted the motion for judgment N.O.V. as to the award for damages for failure to pay maintenance and cure.

Plaintiff appealed and the Fifth Circuit Court of Appeal reversed and rendered, (July 2, 1981, 649 F.2d 372) reinstating the $296,240.00 as a result of a finding that Taylor failed to provide proper cure or care, citing Cortes v. Baltimore Insulor line, 287 U.S. 367, 53 S.Ct. 173, 77 L.Ed. 368 (1932), Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 2d 88 (1962) and Blanchard v. Cheramie, 485 F.2d 328 (5th Cir. 1973) as authorities.

REASONS FOR GRANTING THE WRIT

I. Cortes, Vaughan & Kraljic

The opinion of the Fifth Circuit in this case is in conflict with that of another circuit, Kraljic v. Berman Enterprises, Inc., 575 F.2d 412 (1978) (2nd Cir., 1978), the landmark United States Supreme Court case Vaughan v. Atkinson, supra, Blanchard v. Cheramie, supra, of The Fifth Circuit and others as will be referred to in this brief.

The first finding of the Fifth Circuit Court of Appeal concerning the jury verdict was that Taylor was neither wilful, arbitrary nor unreasonable in its failure to pay $8,760.00 in maintenance and cure benefits, in spite of the fact that the jury found that it was. Instead, the Court considered Taylor's conduct prior to the date that Gaspard terminated his employment and found that there was an "unreasonable" failure to provide "cure" by means of recompression to Gaspard which may have aggravated his condition and that he could recover full tort damages as a result under the section of damages for failure to pay maintenance and cure. However, the two cases cited

as authorities for this proposition, Cortes and Vaughan, supra, concern two separate and distinct types of damages. The Cortes case, supra, is explained in G. Gilmore and C. Black, Jr., The Law of Admiralty 311 (2nd Ed. 1975) under the section of shipowner's duty to provide proper care and treatment to an injured or ill seaman. In that case, Justice Cardozo reasoned that the seaman deprived of proper medical care suffers a "personal injury" quite as much as the sailor who falls from a defective rigging and breaks his leg; and therefore if the seaman's condition is aggravated by the lack of proper care the shipowner is liable not only for the increased medical expenses and maintenance that may become necessary but also for resulting damages. Such damages could be recovered either in an action for maintenance and cure or in an action for negligence under the Jones Act.

In 1962 the United States Supreme Court "added a new wrinkle to the damage recovery" as expressed in Gilmore and Black, supra, 312, in Vaughan v. Atkinson, supra. Plaintiff had sought unsuccessfully to include an award for counsel fees for the failure to pay maintenance and cure. The Supreme Court held that

the defendant's attitude and behavior had been "callous . . . willful and persistent" and that his "recalicitrance" had forced plaintiff "to hire a lawyer and go to Court to get what was plainly owed him under laws that are centuries old." (82 S.Ct. at 999.) The majority of the Court, speaking through Justice Douglas, held that counsel fees should be awarded. All of the Justices were seemingly in agreement that the punitive damages were recoverable whether or not it was shown that the defendant's breach of duty had "caused" or "aggravated" the plaintiff's disability, provided that the defendant's behavior could be characterized as "callous", "willful", "wanton" "intentional" and so on. (Gilmore and Black, supra, at p.313.) Since Vaughan, it has become routine for every seaman's suit to claim damages for failure to pay maintenance and cure. In fact, Vaughan is often cited in other kinds of cases as authority for the federal courts to assess attorneys' fees when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." See Runyon v. McCrary, 96 S.Ct. 2586, 2601, (1976), a civil rights suit. And also since Vaughan, every circuit including The Fifth has held to the standard of callousness and recalcitrance to uphold

an award for damages to pay maintenance and cure. Blanchard v. Cheramie, supra, is a prime example. The Court held there that the "failure to give maintenance and cure may give rise to a claim for damages for the suffering, for the physical handicap, which follows, and reasonable attorney fees may be allowed where required to obtain recovery from a callous, recalcitrant vessel owner," (p.331) and cited Vaughan as authority. In Robinson v. Pocahontas Inc., 477 F.2d 1048 (1st Cir. 1973) the Court upheld a recovery of $21,366.06 on the maintenance and cure claim of which $10,000.00 was designated as punitive damages, relying on Mr. Justice Stewart's dissenting opinion in Vaughan v. Atkinson that if the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with traditional concepts of the law of damages. Richard v. Bauer Dredging Co., 433 F.2d 955 (5th Cir. 1970), cited by the Court in the opinion, held that it is the arbitrary or capricious conduct of the employer which is an absolute prerequisite to the allowance of attorney fees for the failure to pay maintenance and cure. In Hudspeth v. Atlantic & Gulf Stevedores, Inc., 266 F.

Supp. 937 (1967) Judge Alvin Rubin cited Vaughan v. Atkinson and examined its effect on the district at p.945:

> In the cases in this district in which attorney's fees or other damages (emphasis added) have been allowed, the Court found that the shipowner was "lax in investigating a claim which they would have found to have merit" and "was arbitrary and unreasonable" in its refusal to pay, Stewart v. S.S. Richmond, E.D.La. 1963, 214 F. Supp 135 or that the owner had "no reasonable excuse" for its refusal. Sims v. Marine Catering Service, E.D.La. 1963, 217 F.Supp. 511.

Judge Rubin also held that where the employer contests its liability for maintenance and cure in good faith, a seaman is not entitled to attorneys' fees or additional damages.

Having examined Vaughan and its progeny, it is necessary to compare Vaughan to the Cortes cases, both of which are lumped together in this decision by the Fifth Circuit Court of

Appeal. Under Cortes, there is an action for "personal injury" under maintenance and cure where there is a failure to provide cure and there is an aggravation of a seaman's injury as a result therof. Justice Cardozo does not demand a standard of callousness or recalcitrance in failing to provide the cure but holds that the action exists merely where there is a negligent omission to furnish care or cure. As Justice Stewart put it in Vaughan v. Atkinson, at 82 S.Ct. 1004, "Cortes dealt with compensatory (emphasis supplied) damages for a physical injury." The Vaughan case, on the other hand, concerns punitive damages which are only allowed when the defendant has been held to have been callous or recalcitrant. Kraljic v. Berman Enterprises, Inc., 575 F. 2d 412 is a 2nd Circuit case decided in 1978. In that case the Court considered the question: "May a seaman in an action for maintenance and cure recover in addition to compensatory damages, both attorney's fees and punitive damages?" The Court discussed two Louisiana cases, Solet v. M/V CAPTAIN H.V. DUFRENE, 303 F.Supp. 980 (E.D.La. 1969), and Stewart v. S.S. RICHMOND, 214 F.Supp. 135 (E.D. La. 1963) both of which awarded a recovery for maintenance and cure plus attorney's fees and damages not characterized

in either opinion as "punitive." In Solet the Court held, "the plaintiff is entitled to recover attorney's fees and damages for the willful failure to pay maintenance clearly due. The Court will hear evidence to determine the amount of damages, if any, and a reasonable attorney's fee." 303 F.Supp. at 989. The Kraljic Court reasoned that in Solet the Court considered the damages as compensatory in nature. The Judge in Kraljic goes on to say at 575 F.2d 412:

> Yet the fact that plaintiff's entitlement was based on a "willful failure" of defendant to pay maintenance and cure would seem to indicate that the damages were punitive. The same apparently inconsistent reasoning is present in Stewart where the damages awarded for willful failure to pay maintenance and cure were limited to those flowing from that failure.
>
> In these two cases the district courts apparently confused two types of damages (emphasis supplied) . . .

The first type is governed by Cortes v. Baltimore. The Kraljic Court explained:

> If the master or owner fails to provide care and as a result the seaman's condition is aggravated, the shipowner is liable not only for the increased medical expenses and maintenance that may become necessary but also for resulting damages. That is to say, following such a breach of duty the seaman may recover full tort damages, including compensation for total or partial disability which the Taylor and Warren cases held, was not recoverable in an ordinary or unaggravated maintenance and cure action. G. Gilmore & C. Black, Jr., The Law of Admiralty 311 (2d Ed. 1975). This was the type of damage Justic Cardozo discussed in Cortes v. Baltimore Insular Line, supra. Kraljic, 575 F.2d at 412.

The second type of damage is allowable only when there has been a willful failure to make maintenance payments and is governed by Vaughn v. Atkinson. The

Kraljic Court also concluded:

> The majority opinion in Atkinson permits a recovery of counsel fees in a maintenance and cure case not as compensatory damages but only where there is a willful refusal by the shipowner to provide maintenance and cure. Recovery of such fees is therefore based upon the traditional theory of punitive damages. 575 F.2d at 414. (Emphasis supplied.)
>
> Apparently this has also been the implicit understanding of the admiralty bar as well since for the more than 15 years since Atkinson there have been no reported cases in this circuit in which the seaman has successfully obtained more than counsel fees as damages for the defendant's willful refusal to pay maintenance and cure. 575 F.2d at 416.

The special interrogatories to the jury in this case concerning maintenance and cure are patterned after the Vaughn v. Atkinson case:

> Was Taylor willful, arbitrary or unreasonable in its failure to pay Paul J. Gaspard maintenance and cure?

Answer: Yes.

> 14. If your answer to Question No. 13 is yes, what amount do you find plaintiff is entitled to recover as damages from his employer <u>because of failure to pay</u> maintenance and cure? (Emphasis supplied.)

Answer: $296,240.00
3rd Supp. Record on Appeal, Vol. III, at 547-49.

The jury was <u>not</u> asked to consider whether or not a failure to provide care or cure on the vessel aggravated Mr. Gaspard's injury nor were they provided with an interrogatory directed to that issue. Counsel for plaintiff did not request such a special interrogatory -- in fact the theory first came up on appeal in an attempt to justify an award of nearly $300,000.00 put as damages for failing to pay some $8,000.00. Both interrogatories clearly say "failure to pay" just as the

interrogatories in Blanchard v. Cheramie did. In all of the so-called Vaughan v. Atkinson cases the decision turned on failure to pay maintenance and cure and whether that failure was willful or callous. In this case, the Court under the guise of the Seventh Amendment guarantee of the right to jury trial, rationalizes the award under interrogatory 14, reasoning that since Taylor was not wilfull, arbitrary or unreasonable in its failure to pay maintenance even though the jury said it was, then what the jury "must have meant" is that cure was not provided. The Court wrote at p.8578:

> We are inclined to agree with the trial court, for the reasons he noted, that Taylor was neither willful, arbitrary nor unreasonable in its failure to pay this $8,760 subsistence allowance. Further, an award of close to $300,000 premised on a failure to pay only $9,000 would certainly concern us.

The Court goes on to hold that the Vaughan standard of willful, callous or recalcitrant failure to pay is not appli-

cable, but the Cortes v. Baltimore standard is and a finding of "unreasonableness" alone is sufficient to award full damages. If the jury was meant to consider the Cortes cause of action there must have been an interrogatory such as: "Did the failure of Taylor Diving to provide adequate cure to Paul J. Gaspard cause or aggravate his condition and if so, what amount do you award for damages because of its failure to provide cure?" The two causes of action are not interchangeable when one or the other doesn't fit; the 2nd Circuit in Kraljic clearly distinguishes between the two. It should not be a guessing game -- if there is to be a jury deliberation on the issue of aggravation due to the failure to provide cure, the interrogatory should say so. Although the jury was charged on the Cortes cause of action, the charge was a form, a standard charge used by Judge Mitchell in every seaman's case since it had been approved by the Fifth Circuit in Blanchard v. Cheramie. It was in the charge to the jury in Blanchard, the same interrogatories were given to the jury and The Fifth Circuit had no trouble in affirming, using Vaughan v. Atkinson as authority. The reality of this case is there is simply no way to reconcile the jury's response to specific interroga-

tories with existing law and the Court's attempt to reconcile it does damage to common sense in the status of the maritime law, as well as to the defendant's rights under the Seventh Amendment. At the least, if the Court was troubled by any concept that the jury was "confused" in this matter or that the interrogatories were confusing, the Court should have ordered a new trial either on the case as a whole or on damages in order that a new jury could make a specific determination as to the amount of damages due.

II. RECOMPRESSION AS "CURE"

To reach its decision, the Court of Appeals stated:

> Extensive testimony established that a failure to provide proper recompression would have been likely to aggravate Gaspard's developing bone necrosis. Further, a jury determination that Taylor unreasonably denied Gaspard recompression treatment and that this denial caused or contributed to Gaspard's condition would be en-

> tirely consistent with the jury's explicit finding that Taylor's negligence played a part in producing Gaspard's injuries. At p.8579.

Thus, the Court found that Taylor failed to provide proper recompression and this was the "cure" that was denied him. The use of the word "cure" in the sense of "maintenance and cure" usually relates to the expense of medical treatment. Bartholomew v. Universe Tankships, Inc., 279 F.2d 911 (2nd Cir. 1960). A seaman has a right to the remedy of cure when falling ill or injured while in the service of the ship. Shaw v. Ohio River Company, 526 F.2d 193 (3rd Cir. 1975). Gaspard didn't fall ill, nor was he injured in the service of the ship. All three of Gaspard's tenders testified that Gaspard never complained to them of pain or the bends. The only testimony in this regard was from the plaintiff and from Bruce Hyland, who was previously represented by Mr. Gisevious in a lawsuit against Taylor Diving! The diagnosis of osteonecrosis came as a big surprise to Mr. Gaspard: "he had no idea that something might in

fact be wrong with him."[1] At trial, the plaintiff testified that Taylor forced him to make a lot of "Z" dives or repetitive dives; that the tables were either inadequate or altered, in short that the decompression time was wrong for the length of time of the dive and that this amounted to negligence. Where is the evidence that the jury found that Taylor unreasonably denied recompression treatment? How can a Court say that the jury's determination was not based instead on Gaspard's repetitive dives and on the utilization of improper or inadequate diving tables and/or inadequate "water stops"?

But recompression in a decompression chamber on the vessel is no more "medical treatment" than the various decompression stops made by the diver; the promulgation and use of diving tables themselves; the use of specialized diving equipment such as helmet and the mixing of certain breathing gases and mixtures. In fact, recompression procedures are routinely carried out by non-medical co-employees, utilizing decompression tables and schedules. No doctors, nurses -- indeed

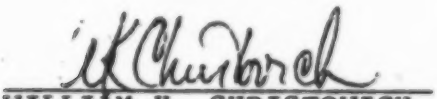
1. 3rd Supp. Rec. on Appeal, Vol. III, p.444.

paramedics -- are at all involved. Taylor -- unlike many diving companies -- did provide appropriate care or "cure" by securing regular bone scans by a radiologist, Dr. Heard, who was expert in diving medicine. When these X-rays showed an area of necrosis in Gaspard's shoulder, he was immediately removed from the diving rolls and given a high paid position as diving supervisor. It would be as foolish to equate decompression and recompression procedures with medical treatment, as it would be to equate the use, for example, of respirators, masks and other protective equipment in sandblasting operations as "medical treat ment." Also, there is not, contrary to the opinion of The Court of Appeal, "extensive testimony" that a failure to provide recompression aggravated the necrosis condition. To the contrary, not a single instance of such testimony was pointed out to the Court in plaintiff-appellant's brief to The Fifth Circuit. Thus, the finding of the Court that a failure to provide recompression aggravated the necrosis condition is not only res nova but is also a complete mystery.

CONCLUSION

We agree that in a case such as this that the Court should "proceed cautiously and validate the jury's verdict if at all possible", but we would remind the Court that the trial judge who was commended by The Fifth Circuit Court of Appeal "for his overall performance in conducting an extremely long and tedious trial" listened carefully not only to all of the evidence but to two separate and thoroughly briefed post trial arguments on these issues. He concluded that the jury's decision was not only invalid, but unjust, and that its response to the specific interrogatory at issue could not be reconciled to the Court's instructions, to the facts of the case, or to the existing law on maintenance and cure. We submit that he was correct and that the opinion of the Fifth Circuit in this case is not only bad law but is in direct conflict with Vaughan v. Atkinson, Cortes v. Baltimore, Blanchard v. Cheramie and Kraljic v. Berman Enterprises and that therefore a writ for certiorari should issue.

Respectfully submitted:



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CERTIFICATE OF SERVICE

Personally BEFORE ME, came and appeared, W. K. Christovich, counsel for Petitioners, Taylor Diving & Salvage Company, Inc., and Highlands Insurance Company, who did depose and say:

That he is attorney for Petitioners, Taylor Diving & Salvage Company, Inc., and Highlands Insurance Company;

That in compliance with rules 21 and 33 of the United States Supreme Court, he has mailed three copies of The Petition for Writ of Certiorari to attorney for respondent, Frederick J. Gisevius, Jr., Richards Building, New Orleans, Louisiana 70112.

New Orleans, Louisiana, this 8th day of October, 1981.

W. K. CHRISTOVICH

Sworn to and subscribed
before me this 8th day
of October, 1981.

NOTARY PUBLIC

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PAUL J. GASPARD	CIVIL ACTION
VERSUS	NO. 74-1528
TAYLOR DIVING AND SALVAGE COMPANY, INC., ET AL	SECTION "F"

J U D G M E N T

This matter came before the court on April 13, 1977. The court having granted defendant's motion for judgment notwithstanding the verdict on the issues of defendant's failure to pay maintenance and cure and damages for failure to pay maintenance and cure; Accordingly, IT IS ORDERED that the judgment of March 9, 1977, is hereby RECALLED, VACATED AND SET ASIDE. Let judgment be entered as follows:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the plaintiff, Paul J. Gaspard, and against Taylor Diving and Salvage Company, Inc. and Highlands Insurance Company in the amount of Forty-Five Thousand Dollars ($45,000.00), with interest from date of

judgment and all costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Paul J. Gaspard, and against Taylor Diving and Salvage Company, Inc. and Highlands Insurance Company, in the amount of Eight Thousand Seven Hundred and Sixty Dollars ($8,760.00) for maintenance and cure.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant, Brown and Root, and against plaintiff, Paul J. Gaspard, DISMISSING said plaintiff's suit against Brown and Root at his costs.

New Orleans, Louisiana, this 21st day of April, 1977.

NELSON B. JONES, CLERK

APPROVED AS TO FORM:

UNITED STATES DISTRICT JUDGE

APPENDIX B

Paul J. GASPARD, Plaintiff-Appellant,

v.

TAYLOR DIVING & SALVAGE CO., INC., et al., Defendants-Appellees.

No. 78-1299.

United States Court of Appeals, Fifth Circuit.

July 2, 1981.

THORNBERRY, Circuit Judge:

[1-4] While employed as a diver for the Taylor Diving & Salvage Company, Paul Gaspard developed osteonecrosis or bone rot in his shoulder joints, a painful and permanent condition that will forever prevent him from diving professionally. When the condition was finally diagnosed in March 1973, Taylor took Gaspard off its diving rolls, but continued to employ him as a diving supervisor until May 1974, when Gaspard decided to leave the company. Gaspard brought suit against Taylor in June 1974, joining counts for negligence under the Jones Act, 46 U.S.C. § 688, unseaworthiness, and maintenance and cure.

He contended that improper supervision and decompression had caused his permanent disability. A jury found Taylor negligent and awarded Gaspard $45,000 under the Jones Act. The jury also awarded him $8,760 in maintenance and care, and, after finding that Taylor wilfully, arbitrarily, or unreasonably failed to pay maintenance and cure, awarded an additional $296,240 in damages.[1] The trial court entered judgment accordingly. Taylor then filed motions for new trial and for judgment n. o. v. as to the award for damages for failure to provide maintenance and cure,

1. The relevant interrogatories and the jury responses were as follows:

> 4. Was [Taylor], through its employees, representatives, and/or agents negligent?
> Answer. Yes.
>
> ....
>
> 5. Did the negligence of [Taylor] play any part, no matter how slight, in producing plaintiff's injuries?
> Answer. Yes.
>
> ....

thus reducing plaintiff's recovery from $350,000 to $53,760. Plaintiff appeals. For the reasons that follow, we think the trial court erred in granting the defendant's motion for judgment n. o. v.[2] and therefore reinstate the jury verdict.

The trial court was troubled by the award of $8,760 for maintenance and cure,[3] apparently because the judge through substantial evidence established that Gaspard

> 8. Was plaintiff, Paul J. Gaspard, negligent?
> Answer. No.
>
> ....
>
> 10. Without any reduction for negligence on the part of plaintiff, if any, what amount do you find will fairly and adequately compensate the plaintiff for his injuries?
> Answer. $45,000.
>
> ....
>
> 12. What amount do you find plaintiff is entitled to receive for maintenance and cure?
> Answer. $8,760.
>
> ....
>
> 13. [W]as [Taylor] willful, arbitrary or unreasonable in its failure to pay Paul J. Gaspard maintenance and cure?
> Answer. Yes.

had in fact reached the point of maximum cure by the time he abandoned his job with Taylor, but the court nonetheless declined to disturb that finding. He focused next on the finding that Taylor had been willful, arbitrary or unreasonable in its failure to pay maintenance and cure and found no evidence to support it. Prior to trial, the plaintiff had neither demanded maintenance payments nor presented any medical bills to the defendant. Except for diagnostic purposes, Gaspard had never been a patient in any hospital, and Taylor had never been informed that Gaspard would undergo those diagnostic tests. As soon as Taylor became aware of Gaspard's condition,

> ....
>
> 14. If your answer to Question No. 13 is Yes, what amount do you find plaintiff is entitled to recover as damages from his employer because of its failure to pay maintenance and cure?
> Answer. $296,240.

3rd Supp. Record on Appeal, Vol. III, at 547-49.

2. In reviewing a judgment notwithstanding the verdict, we do not reevaluate the evidence to form our own conclusions regarding the correctness of the jury verdict. Rather, we determine whether reasonable men could, on any theory submitted to

the company offered him a position as a diving supervisor, and Gaspard held that position for at least eight months. For these reasons, the court found no evidence that Taylor had been willful, arbitrary or unreasonable in failing to pay maintenance and cure, and no evidence that Gaspard had been injured by that failure.

We think it apparent that the court, in reaching its conclusion, focused only on Taylor's conduct after Gaspard had left the company. That limited focus is perhaps explained by the fact that the jury no doubt reached the figure of $8,760 by awarding Gaspard $8 in maintenance for each

the jury, have resolved the dispute as the jury did. Crowe v. Lucas, 595 F.2d 985, 989 (5th Cir. 1979); Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc). In Boeing we stated:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence--not just that evidence which supports the non-mover's case--but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor

day since the day he left Taylor. We are inclined to agree with the trial court, for the reasons he noted, that Taylor was neither willful, arbitrary not unreasonable in its failure to pay this $8,760 subsistence allowance. Further, an award of close to $300,000 premised on a failure to pay only $9,000 would certainly concern us. We are, however, required by the nature of this case to consider Taylor's conduct prior to the day that Gaspard terminated his employment. Having done so, we find that the evidence adduced at trial does support the jury verdict.

of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury.
411 F.2d at 374. The Boeing standard does not apply to Jones Act claims--the court can direct a verdict or grant judgment n. o. v. on a Jones Act count only when there is a complete absence of probative facts supporting the non-movant's position.

[5-7] The duty to provide maintenance and cure embraces not only the obligation to provide a subsistence allowance and to pay for medical expenses actually incurred by the seaman, but to take all reasonable steps to ensure that the seaman, when he is injured or becomes ill, receives proper care and treatment. See generally 2 Norris The Law of Seamen (3rd ed. 1970 & Supp.) § 583 et seq., and cases cited therein. If an unreasonable failure to provide maintenance and cure aggravates the seaman's condition, the shipowner is liable not only for the increased medical expenses and maintenance that may become necessary, but also for the full tort damages that result. Cortes v. Baltimore Insular Line, 287 U.S.

411 F.2d at 370; Allen v. Seacoast Products, Inc., 623 F.2d 355, 360 (5th Cir. 1980). We are mindful that, in light of the seventh amendment guarantee of the right to jury trial, we must proceed cautiously, and we must validate the jury verdict if at all possible. See, e. g., Lucas v. American Manufacturing Co., 630 F.2d 291, 293 (5th Cir. 1980); Guidry v. Kem Manufacturing Co., 598 F.2d 402, 406 (5th Cir. 1979), cert. denied, 445 U.S. 929, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980). We also recognize that ambiguities or doubts in the application of the law of maintenance and cure are

367, 53 S.Ct. 173, 77 L.Ed. 368 (1932); see Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962); Blanchard v. Cheramie, 485 F.2d 328 (5th Cir. 1973). If the shipowner, in failing to provide maintenance and cure, has been callous and recalcitrant, Vaughan, 82 U.S. at 530-31, 83 S.Ct. at 999, or arbitrary or capricious, see Richard v. Bauer Dredging Co., 433 F.2d 955 (5th Cir. 1970), reasonable attorney's fees may also be recovered.[4] Thus, as Justice Cardozo noted in Cortes, a seaman whose injuries are aggravated by a negligent failure to provide appropriate care on board ship has overlapping causes of action. He can recover full tort damages under either a count for negligence

resolved in favor of the seaman. Liner v. J. B. Talley & Co., 618 F.2d 327, 332 (5th Cir. 1980).

3. We recently described the right to maintenance and cure:

> Maintenance and cure are centuries old remedies under the general maritime law. A seaman's right to maintenance and cure is implicit in the contractual relationship between the seaman and his employer, and is designed to ensure the recovery of these individuals upon injury or sickness sustained in the service of the ship.

under the Jones Act or a count for breach of the maritime duty of maintenance and cure. 287 U.S. at 374-75, 53 S.Ct. at 175.

[8] Our review of the record convinces us that the jury could reasonably have concluded that Gaspard, on a number of occasions, suffered pain, nausea, and other symptoms of decompression sickness, reported these symptoms to Taylor, yet was unreasonably denied treatment in a recompression tank. Extensive testimony established that a failure to provide proper recompression would have been likely to aggravate Gaspard's developing bone necrosis. Further, a jury determination that Taylor unreasonably denied Gaspard

> Maintenance and cure are due without regard to the negligence of the employer or the unseaworthiness of the ship. Maintenance is a per diem living allowance, paid so long as the seaman is outside the hospital and has not reached the point of "maximum cure." Cure involves the payment of therapeutic, medical, and hospital expenses not otherwise furnished to the seaman, again, until the point of "maximum cure."
>
> Plotting the point of "maximum cure" is a troublesome task both factually and as a matter of law. The accepted legal standard holds that

recompression treatment and that this denial caused or contributed to Gaspard's condition would be entirely consistent with the jury's explicit finding that Taylor's negligence played a part in producing Gaspard's injuries.[5] The jury was thus entitled to award Gaspard full tort damages under either the Jones Act count, or both, as long as it did not award a double recovery for any element of damages. Given the nature of Gaspard's injury, the pain and suffering he continues to endure, his permanent disability from the lucrative diving profession, and the possibility that he will eventually require surgery to have artificial shoulder joints inserted,

> maximum cure is achieved when it appears probable that further treatment will result in no betterment of the seaman's condition. Thus, where it appears that the seaman's condition is incurable, or that future treatment will merely relieve pain and suffering but not otherwise improve the seaman's physical condition, it is proper to declare that the point of maximum cure has been achieved.

Pelotto v. L & N Towing Co., 604 F.2d 396, 400 (5th Cir. 1979) (citations omitted).

we do not consider the jury's total award of $350,000 to be unreasonable. The trial court apparently would agree with us--he stated that he would have had no problem if the jury had awarded this amount entirely under the Jones Act count. 4th Supp. Record on Appeal, Vol. 1, at 21. The court's detailed instructions made it absolutely clear that the jury was not to award a double recovery. The total award is not so high as to warrant an inference that, in awarding $45,000 under the negligence count and $296,240 under the maintenance and cure count, the jury disregarded its instructions.

4. The trial court had instructed the jury as follows:

> Where the defendant willfully and arbitrarily fails to pay maintenance or provide care to a seaman, and such failure results in an aggravation of the seaman's injury, then the seaman may recover those damages and necessary expenses as he can prove he sustained. This would include damages for loss of future earnings, pain and suffering, medical expenses and a reasonable sum to compensate his attorney for services furnished in obtaining

Finally, although we must reverse the trial court on this issue, we think it appropriate to commend him for his overall performance in conducting an extremely long and tedious trial. The trial lasted six weeks and produced a record of twenty-one volumes. The attorneys for both sides were often volatile and not often helpful. Reviewing the record in light of what we had to endure in only forty minutes of oral argument, we are convinced that the trial court displayed a remarkable degree of patience and restraint.

REVERSED.

maintenance and cure for the plaintiff.

Therefore, in order to award damages to the plaintiff for the failure of the ship owner to provide maintenance and cure, you must first have found (1) that plaintiff was entitled to maintenance and cure; (2) that it was not provided; (3) that defendant willfully and arbitrarily failed to provide it; and (4) that such failure resulted in injury to the plaintiff.

In order for plaintiff to receive damages for defendants' failure to pay maintenance and

cure, plaintiff must have shown that the failure to pay was arbitrary, willful or callous. If reasonable grounds exist for defendants' refusal, no award for damages should be given. 3rd Supp. Record on Appeal, Vol. III, at 530-31. As noted in the text, willful and arbitrary conduct is a prerequisite only for an award of attorney's fees. An unreasonable failure to provide proper care, even absent a showing of willfulness, callousness or arbitrariness, is sufficient to render the shipowner liable for full tort damages. Plaintiff's attorney voiced no objection to this instruction. Any error was cured by Interrogatory No. 13, which specifically asked the jury whether the defendant was "willful, arbitrary, or unreasonable" in its failure to pay maintenance and cure, id. at 534-35 (emphasis added), thus allowing the jury to award full damages on a finding of unreasonableness without more.

5. On appeal, Taylor does not challenge the finding of negligence.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-1299

PAUL J. GASPARD,

Respondent

versus

TAYLOR DIVING & SALVAGE COMPANY, INC., BROWN & ROOT, INC., and HIGHLANDS INSURANCE COMPANY,

Petitioners

ON PETITION FOR REHEARING
August 24, 1981

Before THORNBERRY, AIMSWORTH and COLEMAN, Circuit Judges. PER CURIAM.

IT IS ORDERED that the Petition for Rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

Entered for the Court.

ROBERT A. AIMSWORTH, JR.
United States Circuit Judge

Opposition

81-701

NO.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

PAUL J. GASPARD,

Respondent

versus

TAYLOR DIVING & SALVAGE COMPANY, INC., BROWN & ROOT, INC., AND HIGHLANDS INSURANCE COMPANY,

Petitioners

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioners-Defendants have demonstrated a direct, irreconcilable conflict in principles of law between the Circuits or whether the opinion of the Fifth Circuit applied established principles of law to the facts of this particular case.

II. Whether the Court of Appeals' examination of the extensive record, the facts in evidence, the charges and the interrogatories with a view to ascertain the jury's intention in answering the interrogatories was a matter limited to the specific facts of this case and not pertaining to any issue of national importance.

III. Whether Petitioners-Defendants' failure to object to any interrogatory or charge or their decision not to ask for any additional interrogatories or to appeal the case preclude their raising such issues by certiorari.

IV. Whether Petitioner-Defendants' refusal

to give treatment to an ill or injured diver-seaman in the recompression chamber aboard the vessel which is needed to prevent permanent injury from nitrogen bubble formation is a failure to provide cure under the general maritime duty to provide care for sick or injured seamen.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NO.

PAUL J. GASPARD,
Respondent

versus

TAYLOR DIVING AND SALVAGE COMPANY, INC., BROWN AND ROOT, INC., AND HIGHLANDS INSURANCE COMPANY,
Petitioners

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Paul J. Gaspard, prays that this Honorable Court deny the Petition for Writ of Certiorari sought by Taylor Diving and Salvage Company and Highlands Insurance Company which writ seeks to review the judgment and opinion of The United States Court of Appeals, Fifth Circuit. Petitioners have included in their Appendix "C" the denial of the

petition for rehearing by the hearing panel. However, petitioners have failed to refer to or include the order of the Fifth Circuit denying the petition for rehearing en banc, regarding which no Judge of the Court voted for rehearing.

STATEMENT OF THE CASE

This case presents solely questions of fact and evidence which the jury determined against Taylor and Highlands. Petitioners-defendants, who agreed with the jury charges and the interrogatories as submitted by the Trial Court, decided not to appeal any facet of this Case. The Fifth Circuit reviewed the facts and evidence in the record, the charges and interrogatories, applied well established principals of law to the facts and evidence and held in favor of Respondent-Plaintiff by affirming and reinstating the jury's full verdict. Since the evidence essential to an understanding of the holding below has been only briefly sketched by petitioners, omitting many the salient facts, plaintiff-respondent shall present some of the evidence supporting the judgment.

Paul J. Gaspard, a twenty-five year old diver-seaman, was caused to suffer

painful and permanently disabling osteonecrosis or bone rot in his shoulder joints. The X-rays objectively demonstrated the injuries which are visualized as "snow caps" or dead bone areas in the shoulders. Abundant evidence established that Taylor was negligent, that this negligence caused and subsequently aggravated his decompression illness or bends, that Taylor refused and failed to provide him with treatment or cure and this failure caused or aggravated the decompression sickness to result in bone necrosis.

Dr. Beckman testified that he would consider it probable that Mr. Gaspard's humeral bone rot will break down and will require the implanation of plastic shoulder joints which themselves only have a ten year useful life.[1]

Taylor violated its own safety regulations and those of the U. S. Navy Diving Manual, recognized as normative in the industry, and incorporated by Taylor into its own safety rules in the following ways. Taylor kept Mr. Gaspard in two hundred feet of

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1. Supp. R., Vol. IV. P. 1221-22

water in the Gulf of Mexico beyond his safe diving time, gave him inadequate decompression and refused to give him recompression treatments in the diving chamber when symptoms of decompression sickness or the bends manifested themselves.

Nitrogen gas in Mr. Gaspard's body had been forced into the liquid state and absorbed by his tissues under the great pressure of the ocean depths. Having been run over his safe diving time and having been depressurized too swiftly and unsafely, the nitrogen gas came out of solution forming bubbles which cut off the blood supply and oxygen to the bones in Mr. Gaspard's shoulders.[2] On at least three occasions when Mr. Gaspard was suffering from decompression

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2. Prior to Mr. Gaspard's being informed that he had bone necrosis, a patternof safety violations aboard the vessel M-266 resulted in a number of injuries to divers.
Supp. R. Vol. II. p. 577
Supp. R. Vol. VII. pp. 1939, 1951
2nd. Supp. R. Vol. III. p. 3799
2nd. Supp. R. Vol. II. pp. 3386, 3389-3391, 3384
The divers, including Mr. Gaspard, had arguments with Mr. Bigger about his violation of safety rules.
Supp. R. Vol. VI. page 1734
Supp. R. Vol. VII. p. 1956, 1969

sickness manifesting itself by pain in his shoulders and skin tingling and reddening, he requested recompression treatment in the recompression chamber located topside of his vessel, M-266. However, the diving supervisors refused to give Mr. Gaspard treatment in the recompression chamber of his vessel, the M-266.[3]

The evidence established that Mr. Bigger, Taylor's diving supervisor, falsified the diving records by recording false diving times. Correct records of diving times were essential for adequate decompression and for determining the needed treatment,

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2nd. Supp. R. Vol. IV. p. 3993
3 rd. Supp. R. Vol. I. pp. 180, 124, 110 35-36
3rd. Dupp. R. Vol. II. p. 325

3. In diving terminology, decompression is the process of gradually returning a diver from ocean depth pressure to the normal atmospheric pressure. Recompression is medical treatment for nitrogen bubble formation in case of diving sickness or the bends which may be manifested after a dive. The diver is repressurized to prevent the damage inflicted on body tissue by bubble formation.
2nd. Supp. R. Vol. I. pp. 115, 119, 218, 227
Supp. R. Vol. I. pp. 218, 227, 292-293

tables and periods of recompression in the chamber. In fact, many of Taylor's diving records seem to have disappeared, or, according to one of Taylor's supervisors, were washed overboard.

Two eyewitnesses and members of the crew of the vessel, Mr. Robert Wells and Mr. Bruce Hyland, unequivocally testified that they witnessed occasions when Mr. Gaspard not only had decompression sickness aboard the vessel, but also when he was refused treatment for this sickness by Taylor's supervisors.[4]

Mr. Gaspard himself testified that on these occasions and others, when he was suffering from diving sickness, he requested, but was persistently denied, treatment.[5] The testimony of Mr. Wells on this crucial point was apparently overlooked by Taylor

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4. Supp. R. Vol. I. pp. 217-218; Supp. R. Vol. VII. p. 1960
5. 3rd. Supp. R. Vol. I. p. 182

in its petition.[6]

The U. S. Navy Diving Manual[7] as well as Taylor's states that pain is the most frequent and predominating symptom of decompression sickness, sometimes accompanied by skin showing a blotchy or motted rash, or a feeling of tingling or numbness of the skin and all are symptoms of decompression sickness. Since these symptoms of decompression are indicative of a dangerous illness, the following directive is contained in the safety manual:

> A diver who has pain that might be a symptom of decompression sickness should have treatment by recompression, even though the pain may turn out to have been from a strain or sprain. WHEN IN DOUBT, TREAT BY RECOMPRESSION. Failure to treat

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6. Petition for Writ of Certiorari, p. 21
These incidences of nitrogen bubble formation within Mr. Gaspard's body tissue were accidents which when left uncared for and untreated by Taylor resulted in permanent injury. In this Jones Act context, however, it has been held that it is not necessary to prove a specific accident because some injuries to seamen develop as a result of repeated trauma such as is seen in most occupation disease cases. See Uric v. Thompson, 337 U.S. 163.

7. Exhibit D-6 at page 170

> doubtful cases is the most frequent cause of lasting injury.

In addition, the U. S. Navy Diving Manual[8] describes the proper medical treatment for decompression sickness in the following terms:

> Treatment of decompression sickness is accompanied by recompression - putting the victim back under pressure to reduce the size of the bubbles and cause them to go back into solution. This treatment is generally done in a recompression chamber.... The use of nearby recompression chamber should always be considered first.

Mr. Rosenberger, one of Taylor's diving supervisors, testified extensively concerning the use of treatment tables as medical care administered by diving personnel under the supervision and direction of doctors who would fly out to supervise treatment when necessary.

MR. GASPARD'S DAMAGES ENTITLE HIM TO SUBSTANTIAL AWARD

Paul Gaspard was born and raised in the small farm community of Marksville, Louisiana. Although he went to the 11th garade, he did

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8. Exhibit D-6 at page 84

not finish high school. Mr. Gaspard was in excellent physical condition when he was hired by Taylor. His entire diving career was spent exclusively with that company. Taylor first discovered changes in the pathology of his shoulder bones in 1971 but did not inform him of this condition until 1973. Thus,it was only much later, after many more exposures to diving and decompression sickness, that Taylor called Mr. Gaspard in and told him he could not dive again because of bone necrosis.

Mr. Gaspard knew that the pain in his shoulders was increasing but did not know the cause was bone necrosis until Taylor's Dr. Workman told him in 1973. It was between 1971 and 1973 that Mr. Gaspard had suffered further pain and symptoms of decompression sickness and was refused treatment or cure.

Since leaving the employ of Taylor, Mr. Gaspard has received no funds or medical assistance whatsoever from Taylor. The medical monitoring of his condition has been obtained exclusively from funds provided to him by sources other than Taylor. Mr. Gaspard has been forced to sell his homes, his horses and cows. He was further required

to borrow money to live, to go to welfare and even to accept food stamps.

Limited education and permanent disability have severely limited what work Mr. Gaspard can do. His injury has destroyed his ability to enjoy life in the robust physical way he did before his bone injuries. He has been forced to live with pain and depression, sleepless nights, and the fear of having his shoulders cave inward, through any stress, necessitating the implantation of plastic joints.

His inability to dive alone entitled Mr. Gaspard to a substantial award for past wages and for loss of earning capacity. In the last full year of employment, Mr. Gaspard earned $34,794.00. He testified that a diver employed in the Gulf should expect to make up to $65,000.00 per year. Mr. Gaspard's past loss of wages to the date of trial was the sum of $131,069.00. He had a life expectancy of 41.6 years and a work life expectancy of 32.5 years. Mr. Gaspard's loss of future earnings would amount to $796,318.00 without any increase for inflation which discounted to present value at 7% was $402,605.00.

PROCEEDINGS IN THE TRIAL COURT

This Jones Act suit was brought by Paul J. Gaspard against Taylor, his employer, for its negligence and its failure to provide maintenance and cure and Highlands as Taylor's insurer under the Direct Action Statute. An award of damages was sought for negligence under the Jones Act, unseaworthiness of the vessel under the general maritime law, maintenance and cure and for failure to provide a cure because of improper care and treatment and for failure to pay maintenance and cure. Mr. Gaspard alleged that Taylor had failed to provide proper and adequate medical treatment, including proper decompression and recompression procedures.[9]

TRIAL COURT'S CHARGES AND INTERROGATORIES ON DAMAGES

The Trial Judge gave extensive charges on the recoverable elements of damages under the Jones Act. The Trial Court then charged the jury concerning damages for failure to provide maintenance and cure. This charge

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9. See Pretrial Order, pp. 2 through 2C.

clearly instructed the jury on the Cortes[10] recovery allowed an injured seaman for failure on the part of his employer to provide him with care or cure aboard the vessel. In addition, the Court charged the jury in accordance with Vaughn v. Atkinson.[11] Petitioners admit that the charges given by the Trial Court were correct and proper.

The jury awarded three separate dollar amounts: $45,000.00 for injuries; $8,760.00 for maintenance and cure and $296,240.00 for damages for failure to pay maintenance and cure. These three separate and specific amounts added up to exactly the sum of $350,000.00. Although the word "damages" was used extensively in the charge, it appears only once in the interrogatories and then in Interrogatory No. 14.

Counsel for plaintiff strenuously objected to the Court's refusal to give special interrogatories which would have given a breakdown of the various elements of

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10. Cortes v. Baltimore Insular Line, 287 U.S. 367
11. Vaughn v. Atkinson, 369 U.S. 527

damages. The abridged colloquy was as follows.[12]

> "Mr. Gisevius: If Your Honor please, the plaintiff objects to the Court's refusal to give special interrogatories submitted by plaintiff which would have permitted the jury to break down the various items of damages we are alleging instead of giving them as one total as the interrogatories would suggest....
>
> "Mr. Gisevius: Yes Your Honor, and my point is that these interrogatories are going into the jury room while your Honor's jury charge in which you gave a breakdown of the elements of damages is not going into the jury room, so that the jury will simply be looking at the interrogatories where there is no breakdown and wherein they are being asked to come up with one figure to cover all of them....
>
> "The Court: I don't agree with that at all Mr. Gisevius."

Petitioner's counsel made no objection whatsoever on behalf of Taylor to Interrogatory 14 or any other interrogatory.

The jury's verdict in the sum of $350,000.00 was made the Trial Court's judgment. On post trial motions, before the Trial Court had the benefit of a typed record, Taylor persuaded the Court to grant a judgment N.O.V. completely wiping out the damages granted by the jury in Interrogatory No. 14 in the sum of $296,240.00.

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12. 3rd Supp. R. Vol. III. pp. 539-541

FIFTH CIRCUIT AFFIRMS JURY VERDICT

When Mr. Gaspard appealed, no cross-appeal was filed raising any question which is now attempted to be urged upon this Court. The Fifth Circuit, having the full record before it and having examined the facts, record, and the applicable law, reinstated the jury's verdict in its entirety and granted judgment in the sum of $350,000. The Court found that the Trial Court had committed error by granting a judgment N.O.V. on the record in this Jones Act case by focusing its attention only on Taylor's conduct after Mr. Gaspard left the company. The Court pointed out that in Cortes, Justice Cordoza, writing for a unanimous court, held that the duty to provide cure embraces the obligation to take all reasonable steps to insure that the seaman, when he becomes injured or ill, receives proper care and treatment aboard the vessel. Such a seaman has overlapping causes of action. He can recover full tort damages under the Jones Act or under the breach of duty to provide maintenance and cure. The Fifth Circuit found from the record that there were numerous instances where Mr. Gaspard suffered

symptoms of decompression sickness which were reported to Taylor; that Taylor unreasonably denied treatment in the recompression chamber and that this denial caused or contributed to Mr. Gaspard's bone necrosis. This unreasonable failure when linked with the jury's explicit finding that Taylor's negligence played a part in producing Gaspard's injuries entitled the jury to award Gaspard's full tort damages under either the Jones Act count or the maintenance and cure count, or both, as long as it did not award a double recovery for any element of damages. The Fifth Circuit found that the Trial Court's detailed instructions made it absolutely clear that the jury was not to award a double recovery and that no inference was warranted that the jury disregarded its instructions.

The Court of Appeals determined that the jury's verdict of $350,000.00 could be reasonably harmonized with the answers to interrogatories and and that the amount itself was reasonable.[13] The Court also took note

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13. The Trial Court did not find the award of $350,000.00 unreasonable in amount if based on the Jones Act. 4th Supp. R. Vol. I. p. 21

of its obligation to resolve any ambiguities or doubts in the application of the law of maintenance and cure in favor of the seaman.[14]

REASONS FOR DENYING THE WRIT

1. NO CONFLICT EXISTS BETWEEN THE OPINION OF THE FIFTH CIRCUIT IN THE INSTANT CASE, ANY OTHER DECISION OF ANY OTHER CIRCUIT OR ANY DECISION OF THE SUPREME COURT.

The opinion of the Fifth Circuit in this case carefully considered the applicable case law in Cortes, Vaughn and Kraljic.[15] The Court's decision is in no way in conflict with any of these decisions, but was in harmony with the principles enunciated in these cases. The Fifth Circuit applied the applicable law to the specific facts of the instant case and found that the jury, having received an admittedly correct charge on these cases, was entitled to award Mr. Gaspard full tort damages under either the Jones Act or under the maintenance and cure

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14. Liner v. J. B. Talley & Co., 618 F. 2d 327, 332 (5th Cir. 1980)
15. Kraljic v. Berman Enterprises, Inc. 575 F. 2d 412 (2nd Cir. 1978)

count, and that the amount of the award was resonable.

What petitioners are really complaining about is that the Court used these holdings to resolve the factual issues in the case at bar against them. Indeed, it is not a conflict among the principles of law enunciated in these cases of which petitioners complain. Rather, petitioners are seeking another chance to relitigate the application of well understood principles to the facts of this particular case. This, of course, is no basis for the granting of certiorari.

The Fifth Circuit's opinion clearly delineates the difference between the Cortes cause of action and the Vaughn cause of action. The jury was given Interrogatory No. 14 which allowed it to base its award for failure of the petitioners to live up to their legal duty under the General Maritime Law regarding maintenance and cure. Petitioners admit that the Cortes count was contained in the charge to the jury,[16] which set out Taylor's obligation to provide

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16. See Petition, p. 19.

maintenance and cure. What petitioners are attempting to do in this Court is to take the standard legal jargon used by lawyers. namely, failure to pay maintenance and cure, and suggests that the jury disregarded the charge on Taylor's duty to provide maintenance and cure because of the use of the word "pay". Of course, the words of Interrogatory No. 14 must be interpreted in the light of the charge given to the jury on the Cortes count, and in the light of the way the words "damages from his employer because of its failure to pay maintenance and cure," would be understood and considered by a jury of laymen. These laymen on the jury had heard extensive itemization of damages for failure to provide cure and for failure to pay maintenance. The charge defined maintenance as the duty to pay subsistence of $8.00 per day and cure as the duty to give care. However, only one place was provided for the jury to give a figure for failure of Taylor's maintenance and cure obligation to Mr. Gaspard.

The Fifth Circuit ascertained the true intention of the jury to give the sum of $350,000.00 to the plaintiff for his injuries and damages.

Petitioners have completely failed to demonstrate a direct, irreconcilable conflict among the Circuits. They have certainly stated no claim upon which certiorari should be granted.

II. THE COURT OF APPEALS' TASK WAS TO REVIEW THE EXTENSIVE RECORD, EXAMINING THE FACTS IN EVIDENCE, THE CHARGE AND THE INTERROGATORIES, WITH A VIEW TO USING EVERY REASONABLE MEANS OF RECONCILING AND HARMONIZING THE JURY'S ANSWERS TO INTERROGATORIES IN ORDER TO ASCERTAIN THE TRUE INTENTION OF THE JURY WHICH WAS CLEARLY TO GRANT RESPONDENT, PAUL GASPARD, AN AWARD OF $350,000.00 FOR HIS TOTAL DAMAGES.

The jury had been given an extensive charge which repeated the word "damages" enumerable times and set out the elements of damages, including pain and suffering, loss of wages and earning capacity, and medical expenses. The only interrogatory which contained the word "damages" and which could be related to the Cortes charge was Interrogatory No. 14. Interrogatory No. 10 addresses only the question of "injury" or "injuries" which the jury would relate to plaintiff's physical injuries, i.e., shoulder injuries.

Counsel for defendant had told the jury that the word "injury" had meant a physical injury or blow of some sort.[17]

In Interrogatory No. 12, the jury awarded $8,760.00 for maintenance and cure, or $8.00 per day subsistence. In No. 13 the jury was asked if Taylor was willfull, arbitrary or unreasonable in its failure to pay maintenance and cure, which it answered "yes".[18] In No. 14, the jury was asked what amount was plaintiff entitled to recover as damages from his employer for failure to pay maintenance and cure which it answered $296,240.00.

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17. 3rd Supp. R. Vol. II. p. 224
18. Petitioners argue that the jury found in No. 13 that Taylor was willfull,arbitrary or unreasonable in failing to pay $8,760.00 but the Fifth Circuit found Taylor wasn't. (See Petition p. 6) However, No. 13 says nothing of any dollar amount. The jury's answer in No. 13 is not in conflict with the Court's holding because the Court pointed out that No. 13 related to the full conduct of Taylor including its refusal to provide care or cure prior to Mr. Gaspard's termination and demand for subsistence, which unreasonable refusal was the basis of the award in No. 14. Petitioners'argument misconstrues the Court's holding, the jury's findings in No. 13 and the abundant evidence relating to the unreasonable refusal of Taylor to give cure.

Thus, with regard to all of the other elements of damages which were painstakingly elaborated upon by the Court in its charge, including pain and suffering, medical expenses, permanent disability and loss of past earnings and loss of future earning capacity, the only place provided in the interrogatories for these multiple considerations under the caption "damages" was in No. 14. It was here that the jury obviously considered all of these elements of damages in one figure, namely, the sum of $296,240.00

The jury awarded three sums of money to the plaintiff: $45,000.00, $8,760.00 and $296,240.00.

These three sums when added together amount to exactly $350,000.00. It approaches mathematical and statistical impossibility to assert that these random figures would add up to $350,000.00 by chance. What the jury obviously intended was to give $8,760.00 for maintenance and the sum of $45,000.00 for physical "injuries". Then the jury combined all the other elements of damages, including loss of future earning capacity, pain and suffering, medical expenses, etc. in the $296,240.00 figure as "damages," logically

placing all these "damages" which it could award under the Cortes charge in the only place that speaks of damages and cure. The evidence clearly established that the failure to provide recompression or cure on the vessel caused or aggravated the bone necrosis which itself resulted in and was the very basis of Mr. Gaspard's massive damages. From this view of the case, the answers were reasonably harmonized and reconciled by the Court of Appeals in a way to fully implement the obvious intention of the jury and the requirements of law in seaman's cases.

In Gallick v. Baltimore & Ohio Railroad Company,[19] this Court held:

> "But, it is the duty of the Court to attempt to harmonize the answers if it is possible under their reading of them. Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.... We, therefore, must attempt to reconcile the jury's findings, by exegesis, if necessary.... before we are free to disregard the jury's special verdict and remand the case for a new trial."

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19. 372 U.S. 108, 118

In Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,[20] this Court held:

> "When there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For the search for one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment."

The Court of Appeals in the instant case followed precisely the teachings of this Court. There was no question whatsoever that the jury intended to award Paul Gaspard the total sum of $350,000.00 for his total damages. The only question was whether the jury, in light of the instructions given regarding damages could reasonably have apportioned the various amounts among the places in the interrogatories provided to it. The Court of Appeals has justly and properly reconciled the jury's award with the charges and the interrogatories.

The evidence adduced by Mr. Gaspard regarding his damages for pain and suffering, future medical expenses, loss of past earnings and future earning capacity was overwhelming.

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20. 369 U.S. 355, 363

The undeniable, objective evidence of the irreversible bone rot in the shoulder joints, the pain, sleepless nights and anxiety associated with such a severe condition, the loss of over $131,000.00 of past earnings, and an estimated loss of future earnings after discount of $400,000.00 would all amply justify an award of greatly in excess of the $350,000.00 total amount awarded by the jury. In fact, no reconciliation of the jury's answers with the evidence adduced could have been possible without concluding that the award of $296,240.00 as "damages" was intended by the jury to cover all those elements of damages specifically covered by the Judge's charge, but for which no other place other than Interrogatory No. 14 was provided them for an award of such damages.

III. PETITIONERS' FAILURE TO OBJECT TO THE INTERROGATORIES OR CHARGES AND THE DECISION NOT TO APPEAL THIS CASE PRECLUDE THEIR RAISING THESE ISSUES IN THE PETITION FOR CERTIORARI.

Petitioners did not point out that they raised no objection whatsoever to the interrogatories propounded by the Trial Court. Instead of attempting to make some issue with

the form of interrogatory at this late time in this Court, petitioners were obliged to join with respondent's counsel in requesting the Trial Court to give specific interrogatories on each element of damages.

It was petitioners who were unsatisfied with the jury's verdict and sought to have the Court grant a judgment N.O.V. Under Rules 49, FRCP, petitioners,by omitting to raise any objection concerning the interrogatories and the facts which the interrogatories sought to obtain from the jury, have waived their right to raise these issues on appeal or writ. In addition, petitioners did not file an appeal or a cross-appeal in the Fifth Circuit.

Petitioners heard the Trial Court give Interrogatory No. 14 joining the two grounds for recovery for Taylor's failure to meet the maintenance and cure obligation to Mr. Gaspard. By their failure to object timely at trial to the interrogatories, petitioners have waived their right to later complain that they were denied their trial by jury. This is particularly true where petitioners have failed to show any prejudice in the jury having one instead of two places to put maintenance and

cure damages. Defendants generally resist efforts to submit interrogatories providing places for specific dollar awards for each element of damage. Obviously petitioners thought it in their best interest not to object to Interrogatory No. 14.

The decisions interpreting Rule 49 make it abundantly clear that the Trial Court has the right to submit to the jury a general verdict.[21] Although, special verdicts are often more desirable, they are not mandatory. There can be no reasonable doubt that in the instant case had this matter been submitted to the jury on a general verdict, the jury's verdict would have been that Taylor was negligent and that plaintiff, Paul Gaspard, was entitled to $350,000.00.

This case encompassed over twenty-one volumes of transcript. After such a large investment on the part of plaintiff, the District Court and The Court of Appeals, petitioners should not be heard to complain in this Court about the form of interrogatories and that additional damage interrogatories should have been propounded by the Trial Court when they did not raise the issue timely at the trial level.

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21. 5A Moore's Federal Practice §49.04

IV. TAYLOR'S ASSERTION THAT RE-COMPRESSION IN THE CHAMBER ON THE VESSEL IS NOT "CURE" IS FLAGRANTLY ERRONEOUS.

As The Court of Appeals noted in its decision, the meaning or "cure" is explained in 2 Norris, The Law of Seamen (3rd Edition 1970 and Supp.) §583 et seq. The master and owner of the vessel have an affirmative duty imposed by the General Maritime Law to accord seamen while aboard the vessel such care and medical attention as the ship is capable of providing. Norris points out further at §583 that the word "cure" means care when used with reference to the shipowner's obligation to furnish a sick or injured seaman with maintenance and cure. The word is derived from the Latin "cura", meaning care.[22]

The Fifth Circuit found that Taylor's failure to provide Mr. Gaspard with treatment in the recompression tank or chamber when he was suffering from decompression sickness was a failure of Taylor to provide the "cure" required under the Maritime Law.

Taylor's position that treatment in the

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22. The Trial Court specifically instructed the jury that cure in "maintenance and cure" meant care. 3rd Supp. R. Vol. III p. 528

recompression chamber is not cure is incredible in the light of the record, particularly the testimony of its own diving supervisor, Mr. Rosenberger. The validity of Petitioners' Writ of Certiorari can be judged by comparing their assertion before this Court that recompression is not cure with the testimony of their own witness and diving supervisor, Mr. Rosenberger.[23] He clearly establishes that diving sickness or the bends is treated in a recompression chamber and that this is medical treatment for a disease administered under the direction of doctors of medicine.

Q. "What situation -- what would have been the procedure if Mr. Gaspard, or any other diver had reported to you that he had pain or some other symptoms of decompression sickness?

A. "Well, first, I'd find out where the pain was, what his symptoms were, and check his motivation, check his hand grip, check his balance, and then I would -- at the same time, I would then prepare the chamber for treatment and we would treat any possibility of the bends at all.

Q. "Now, please tell us, Sir, what type, if any, report would be made out in conjunction with any such treatment?

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23. Supp. R. Vol. IX. pp. 2947-46

A. "Well, at that time we would make out a standard bend report, the table would be decided after the man's in the chamber, when he responds to relief, not partial relief, but complete relief, and we go by Navy tables and we use the table accordingly.

"Quite often we intend -- put extensions on this which upgrades the treatment. At that time we also notify the home office. We have a doctor there to question, seek advice, and if there's any additional changes to treatment, he would either fly out or recommend by phone."

Nothing could be clearer than the U. S. Diving Manual's statement[24] that treatment of decompression sickness is accomplished by recompression - putting the victim back under pressure to reduce the size of bubbles and to cause them to go back into solution, and that this treatment is done in a recompression chamber.[25] Mr. Fred Bigger, another of Taylor's diving supervisors,[26] admitted that treatment tables should be used to treat decompression sickness and that failure to

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24. Exhibit D-6, U.S. Navy Diving Manual, p. 170
25. Exhibit D-6, p. 84
26. Diving Supervisors can be compared with paramedics. They can administer drugs

treat could result in damage to nerves, joints and bone cells.[27]

CONCLUSION

For these reasons respondent, Paul J. Gaspard, respectfully prays that the Petition for Writ of Certiorari be denied.

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intravanously. They are trained to recognize and treat a wide range of medical emergencies: shock, hypoxia, asphyxia, respiratory problems, unconsciousness, suffocation, strangulation, poisoning from carbon monoxide, oxygen, carbon dioxide, nitrogen narcosis, decompression sickness, air embolism, pain, depression, etc. See Exhibit D-6, p. 64-89; Exhibit P-40, p. 4.

27. 2nd Supp. R. Vol. II. pp. 3169 and 3233; pp. 3190, 3186-87

CERTIFICATE OF SERVICE

Personally BEFORE ME, came and appeared, Jane M. Gisevius, counsel for Respondent, Paul J. Gaspard, who did depose and say:

That she is attorney for Respondent, Paul J. Gaspard;

That in compliance with rules 21 and 33 of the United States Supreme Court, she has mailed three copies of the Respondent's Brief In Opposition to Writ of Certiorari to Attorney for Petitioners, W. K. Christovich, 1900 American Bank Building, New Orleans, Louisiana 70112.

New Orleans, Louisiana, this 9th day of November, 1981.

Jane M. Gisevius
JANE M. GISEVIUS

Sworn to and subscribed
before me this 9th day
of November, 1981.

James W. McCain
NOTARY PUBLIC